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THE EUROPEAN INTERGOVERNMENTAL CONFERENCE: AN AMERICAN PERSPECTIVE

George A. Bermann*

Peter Herzog's career-long interest in the European Communities makes it especially appropriate to include in this *festschrift* a contribution on what has become the principal mechanism for reforming the treaties that constitute those Communities. I refer of course to the "intergovernmental conferences," or "IGCs" for short. As this *festschrift* goes to press, the fifteen Member States are submitting the results of the latest IGC—the 1997 Treaty of Amsterdam¹—to their respective national ratification processes.

As its name suggests, the intergovernmental conference is a gathering of representatives of the Member States to discuss and eventually agree upon amendments to the constitutive treaties as they then stand. The EC Treaty, by its own terms, requires that all treaty amendments be prepared by such an intergovernmental conference and be submitted to the Member States for their separate ratification,² and the Treaty on European Union (the TEU or Maastricht Treaty) contains a parallel provision.³ In point of fact, the recent Amsterdam Treaty is little more than a set of amendments to the EC Treaty and the TEU.

Recent intergovernmental conferences have been followed with intense interest in European circles, as indeed they should be, for they represent a kind of periodic constitutional convention. At a minimum, they are the means by which the Member States adapt the treaties that constitute the European Communities, and now the European Union as well, to the needs of the future.

Depending on its programmatic content, a European IGC can also generate considerable political and economic interest abroad. The IGC that led up to adoption of the Single European Act in 1986 (including certain amendments to the then-EEC Treaty) was dominated by a legis-

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1. Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Nov. 10, 1997, 1997 O.J. (C 340) 1 [hereinafter Treaty of Amsterdam].

2. TREATY ESTABLISHING THE EUROPEAN COMMUNITY art. 236, 1992 O.J. (C 224) 1, [1992] 1 C.M.L.R. 573 (1992) [hereinafter EC TREATY].

3. TREATY ON EUROPEAN UNION art. N, Feb. 7, 1992, 1992 O.J. (C 191) 1, [1992] 1 C.M.L.R. 741 [hereinafter TEU]. The TEU, in addition to introducing amendments to the EC TREATY and the other Community treaties, established a European Union (of which the EC was to form a part) and authorized the conduct of important intergovernmental activities (notably in the foreign and security policy area and in justice and home affairs) in the name of the EU.

lative program for completion of the so-called internal market; it accordingly generated fears in the United States of a "fortress Europe." The IGCs that in turn produced the Maastricht Treaty dealt in large measure with a blueprint for the construction of an economic and monetary union (EMU), consisting of a single currency and a system of central banks authorized to determine macro-economic policies for most if not all of the EU's Member States; the prospect of an EMU likewise entailed a certain threat to American interests and accordingly earned serious attention in this country. But, as the most recent conference demonstrates, IGCs do not necessarily have so strongly political a transatlantic dimension. While the EU's eastern enlargement, which cast a long shadow over the 1996 IGC, will obviously have repercussions outside Europe, the latest IGC was viewed very largely as a "European" affair.

Whatever their significance for the transatlantic relationship may be, the European IGCs invariably also hold interest from a comparative constitutional law perspective. Judged in these terms, the IGC is a highly curious phenomenon. This article seeks to sketch what appear to be the most salient characteristics of the intergovernmental conference as a general instrument of constitutional reform. In so doing, it also examines the fruits of the latest intergovernmental conference—the IGC that opened in Turin, Italy, in March 1996 and culminated in the Amsterdam Treaty of 1997. Finally, it implies some of the ways in which the intergovernmental conference, as a vehicle for constitutional reform, might in the future be made better adapted to its task.

By their very nature, the IGCs serve as constant reminders that, however "constitutive" of supranational entities the constitutive treaties may be, they are still in their origin nothing but treaties. As a result, when the time comes to modify the ground rules by which the supranational institutions operate, the Member States return to the source: the making of international treaties among sovereign states. This will explain many of the characteristic features of the IGCs, starting with the very secrecy with which they proceed.

I. SECRECY

Though contemporary constitutional reform ordinarily takes place in the light (or relative light) of day, this is unlikely to be so in the case of constitutional reform conducted through international agreement. Admittedly, the IGCs no longer proceed with quite as much secrecy as they have in the past. This is due largely to the important role in the IGCs played by the supranational institutions themselves, as opposed to the Member States. At the 1996 IGC, certain of the institutions (the

Commission, the Parliament and the Court, in particular) had a fairly strong interest in defining both the issues before the IGC and their institutional positions on those issues.

Ultimately, however, the Member States themselves have the decisive voice; that is the nature of an IGC, however much the institutions may have been called upon to help prepare it. In the last IGC, as in those that preceded it, the Member States refrained from making their initial positions on the issues publicly known; much less did they make known the extent to which they might be willing to make concessions on some issues in order to achieve the results they sought on other issues. To the extent that the IGC is a treaty negotiation among States with potentially conflicting interests, it is hardly surprising that Member States keep their proverbial "cards" to their "chest" until the waning hours of the conference. But it is, at the same time, not particularly conducive to good constitution-making.

II. SCOPE

The use of intergovernmental conferences for amending the constitutive treaties also has implications for the sheer scope of debate. By definition, an IGC may have on its agenda any matter that could plausibly occasion an amendment to, or an extension of, any of the constitutive treaties among the Member States. To be sure, the latest IGC had the benefit of a report by a Reflection Group whose purpose was precisely to focus attention on the most pressing questions, and that report in turn was informed by focused reports prepared by each of the different EU institutions. The fact remains that the Member States were able to, and did, place on the IGC agenda any and all items that they deemed desirable to address through treaty amendment. This makes for a conference of practically limitless possibilities.

The failure to delineate the issues before an IGC presents the participants with a number of problems. First, it raises a problem of *resources*, since participants simply cannot muster the energies that due attention to all the potential and actual agenda items requires. Second, it raises a problem of *expectations*, since it generates unrealistic ambitions about the scope and scale of constitutional reform that can reasonably be expected to emerge at the end of the IGC. The problem of expectations affects not only the IGC participants, but the public more broadly. Finally, the notion that virtually everything is negotiable or re-negotiable at an intergovernmental conference creates a problem of *impermanence*. Although this is largely a problem of appearances, it is a problem none-

theless, for it fosters the idea that nothing (repeated references to the *acquis communautaire* notwithstanding) is fixed and durable.

In each of these respects, a comparison with constitutional amendment in the United States, while not entirely fair, is nevertheless revealing. Among the reasons why the constitutional amendment process in the U.S. is so manageable is that debates leading to amendments are invariably based upon a precise and focused text relating to one or more discrete public issues. Thus, by their nature, amendment proposals raise neither the resource, expectations nor impermanence problems that attend the EU's intergovernmental conferences. To put the matter differently, Member States truly approach the IGCs more as if they were periodic constitutional conventions than occasions for successive constitutional amendments, and doing so exacts a price.

Consequently, at the end of the day, IGCs have tended to produce widely disparate sets of treaty amendments, some elements of which doubtless deserved fuller and more public debate than, under the circumstances, they could possibly receive. The 1996 IGC was no exception. Alongside some fairly technical changes (e.g., alteration of the final step in the parliamentary co-decision procedure for legislation⁴) and the addition of some uncontroversial substantive chapters (e.g., the new chapter on unemployment⁵), the Amsterdam Treaty contains some breathtakingly important and innovative material. Despite their rather innocuous title, for example, the new provisions for "enhanced cooperation"⁶ open up dramatic possibilities for a "two-or-more-speed" Europe and all that that entails. So, too, do the new procedures by which Member States may be sanctioned for committing persistent breaches of fundamental Community law principles.⁷

It may be that the time has arrived for the European Union to convene intergovernmental conferences around a smaller number of reasonably well-defined issues—preferably with a specific text dealing with those issues, and only those issues, on the table. This is one way in which they might better overcome the resources, expectations and impermanence problems that they have generated. It is also a way in which the States and institutions might ensure that reforms on the table (particularly those ultimately adopted) receive the careful consideration they deserve.

4. Treaty of Amsterdam, *supra* note 1, amending EC TREATY, art. 189b.

5. *Id.*, adding a new Title VIa to the EC TREATY, consisting of arts. 109n-109s, (on employment).

6. *Id.*, adding a new Title VIa, arts. K.15-K.17, to the TEU, and a new art. 5a to the EC TREATY.

7. *Id.*, adding art. F.1 to the TEU.

III. INSTITUTIONAL EMPHASIS

At the same time, amending the constitutive treaties by intergovernmental conference would seem to risk giving political issues undue priority, at the expense of basic institutional questions. Certainly, in the U.S. experience, constitutional debates and documents have had a distinctly institutional focus. Not surprisingly for a product of its age, the U.S. Constitution is in fact heavily institutional in orientation, and subsequent amendments (even the Bill of Rights notwithstanding) have not fundamentally altered that. U.S. constitutionalism proceeds very largely on the belief that what is essential about constitutional government is basic confidence in the institutions in whose hands political decisions will inevitably come to rest, and confidence in the processes by which those institutions go about their business.

In fact, the risk that I have identified does not seem as such to have materialized in the EU setting. Every recent IGC has had a major institutional dimension, with the result that the treaty amendments that followed have themselves had an important institutional component. Once again, the 1996 IGC is no exception. Its consolidation of the EC legislative process into a fairly unitary one, based upon the principles of parliamentary co-decision,⁸ is a good example. Not only is this consolidation desirable from the point of view of procedural simplicity and transparency, but it goes a long way to removing incentives for the institutions themselves to manipulate the "legal basis" on which measures are proposed and adopted, or for Member States to mount judicial challenges to the "legal basis" of the measure that is ultimately enacted.⁹

Although the intergovernmental character of the amendment process has not in fact diverted institutional issues from the IGC agenda, it can nevertheless affect the way in which those issues are treated. There is no other way to explain the failure of the 1996 IGC to resolve such obviously pressing institutional questions as the size and composition of the European Commission after enlargement, or the re-weighting of votes in qualified majority decisionmaking. These issues go to the heart of the EC legislative process, and appeared to be ones that the IGC simply could not fail to resolve—as it in fact did.

IV. SUBSTANTIVE LAW GROWTH

Intergovernmental conferences have varied widely in the extent to which they considered adding new substantive chapters to the constitu-

8. *Id.*, amending various articles of the EC TREATY.

9. See generally, GEORGE A. BERMAN, ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 84-90 (1993).

tive treaties, and thus new competences to the European Union. The 1996 IGC distinguished itself from immediately prior ones by adding only lightly to the existing competences. While earlier treaty amendments had given the institutions new legislative powers over environmental policy, occupational safety and health, consumer protection, social policy, education, vocational training, and culture—among many other subjects¹⁰—the Amsterdam Treaty only added employment to the competences of the Union.¹¹

This slowdown in the expansion of European Community competences is to be welcomed. Looking at the treaties as they stand, there is certainly nothing conspicuously absent from the substantive chapters of the treaties that cannot be adequately explained or justified. In any case, Articles 100a and 235 of the EC Treaty give the institutions ample means for filling any major gaps. Moreover, any further proliferation of separate chapters risks impairing the unity and coherence of which the treaties have such evident need.

Quite apart from any commitment to the principle of subsidiarity,¹² I believe that the European Union would do well to demonstrate that constitutional progress does not necessitate the expansion of the Union's legislative jurisdiction. Aside from the fact that expansion is not necessarily progress, it is unrealistic, and ultimately unhealthy, to expect that every few years and every successive IGC will bring in their wake a conspicuous subject matter expansion of the EU. Thus, the Amsterdam Treaty has the merit of *not* adding substantially to the Union's existing competences and of showing that an IGC does *not* have to add new substantive chapters to the treaties, or else be counted as a failure. A consolidation of gains is every bit as worthy a constitutional project as an extension of the outer bounds of legislative competence. Not to derive that lesson from this IGC will set the Member States and institutions up for inevitable disappointment in the years ahead.

10. These chapters were largely added to the EC Treaty by provisions of the Single European Act, Jun. 29, 1987, 1987 O.J. (L 169) 1, [1987] 2 C.M.L.R. 741 [hereinafter SEA] and the TEU.

11. See *supra* note 5 and accompanying text.

12. EC TREATY art. 3b. "In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community." *Id.*

V. UNFINISHED BUSINESS

If a perpetual extension of power is neither necessary nor even good for the European Union, progress of another kind is very much in order. If we look back on the last forty years, and the last several IGCs, we cannot help but observe that certain basic and quite "constitutional" achievements within the grasp of the European Union still remain to be made. These omissions are all the more striking in light of the substantial efforts that were made in the run up to the 1996 IGC to ensure that these very achievements did not remain undone.

While a respectable constitution can certainly fail to deal with questions such as the "legal personality" of the political entity and "the hierarchy of legal norms" (note that the U.S. Constitution largely fails to do so in both respects), these issues figured prominently in discussions leading up to the 1996 IGC, and legal scholars had invested considerable effort in their resolution. The silence of the Amsterdam Treaty on these scores is, to that extent, cause for disappointment.

But if constitutional resolution of these issues can be considered something of a luxury, the resolution of other such issues cannot. Yet they, too, remain unaddressed. Of these, let me mention two.

The first is the issue of the so-called simplification and consolidation of the treaties. By any standard, the constitutive treaties are a complicated set of texts, both in the way in which they relate to one another and in their own terms. Judged by the standards of a constitution (which they admittedly are not), they simply do not measure up. It is difficult to believe that the European Union would not be strengthened, at least in the eyes of the public in whose interest it was established and on whose allegiance it depends, if the treaties constituting the Communities and the Union were made architecturally simpler and substantively more coherent. In at least this respect, they could readily stand to be "constitutionalized". It is certainly not the case that inadequate preparatory work had been done on this front.

Still more conspicuous in its absence from the constitutive treaties is a straightforward expression of fundamental human rights. Observers of Community law are only too aware of the efforts the Court of Justice has made through its case law to fill the gap in individual rights protections; it has found support for these efforts in the European Human Rights Convention (to which every Member State is currently a party) and in the common "constitutional traditions" of the Member States themselves.¹³ But, in light of the Union's far-reaching legal powers,

13. See generally BERMANN, ET AL., *supra* note 9, at 142-49.

inclusion of a human rights charter in the body of the constitutive treaties themselves is by no means too much to expect, and would in fact go far toward strengthening the Union's political legitimacy. Despite demands by the Parliament, the support of the Commission and urgings by a number of Member States, this too—after several comprehensive IGCs—remains undone.¹⁴

With respect to issues of this order—legal personality, hierarchy of legal norms, simplification and consolidation, and human rights—it may be less important *how* they are handled than *that* they are handled, once and for all. These are not issues that a mature legal system should chronically revisit, IGC after IGC. At some point surely arrived at by now, they should be taken out of the political arena and become more or less constitutionally resolved.

Although it would clearly be appropriate to have addressed these issues constitutionally by now, the drafters of the Amsterdam Treaty chose instead to address constitutionally once again the issue of subsidiarity. A special protocol to the treaty records the Member States' understanding of what the subsidiarity principle means and how, at least in some ways, it is to be enforced.¹⁵ However, even a cursory examination of the protocol will show that the drafters thereby added little to our understanding of either the meaning or workings of subsidiarity. Nor is it realistic to suppose that the drafters could have done much better than they did. One can only conclude that, however little clarity in understanding subsidiarity this exercise has brought, it was considered politically indispensable in many, if not most, of the Member States. In this, too, we observe the powerful effects of intergovernmentalism in the constitutional reform of the European Union.

The Member States do not need to abandon the intergovernmental conference as the favored mechanism of constitutional reform at the European level. But they do have some choice as to quantity and quality of matters for discussion, as to the degree of focus, as to the ways in which the conference is prepared and conducted, and as to the emphasis to be given to the various issues competing for attention. The choices made will depend not only the effectiveness of the individual IGCs and their treaty results, but also the legitimacy and public standing of the entire enterprise.

14. According to a recent judicial opinion of the Court of Justice, even accession of the European Union to the European Human Rights Convention would require an amendment of the EC Treaty and the other constitutive treaties. *See In re the Accession of the Community to the European Human Rights Convention*, Opinion 2/94, 1996 E.C.R. I-1759, 2 C.M.L.R. 265 (1996).

15. Protocol (to the Treaty of Amsterdam) on the Application of the Principles of Subsidiarity and Proportionality. Treaty of Amsterdam, *supra* note 1.